Petition

Petition

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No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1981.

LEONARD J. MERSKI,
PETITIONER,

v.

STATE OF NEW HAMPSHIRE,
RESPONDENT.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW HAMPSHIRE

PETITION FOR CERTIORARI

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Questions Presented for Review.

The Defendant, Leonard J. Merski was indicted by the Merrimack County New Hampshire Grand Jury on January 2, 1979 for an alleged violation of New Hampshire R.S.A. 637:3. Specifically, the indictment alleged that the Defendant committed theft by unauthorized taking of funds from the account of a probate estate he had represented. Allegations of defalcation came to the attention of the New Hampshire Attorney General's office from the New Hampshire Professional Conduct Committee after the Defendant's resignation with prejudice was accepted by the New Hampshire Supreme Court on August 1, 1978.

The Committee, by its Administrator Wesley Miller, Esquire, obtained evidence from the file of the probate estate after he seized the file from Defendant's secretary without his knowledge or consent and without a search warrant. The Committee later turned the file over to the new Attorney for the probate estate, Bruce Viles, and instructed her to investigate and report to the Committee on her findings. On October 31, 1978, the Committee's Chairman, Robert Raulerson, Esquire, wrote to the Attorney General and disclosed the information regarding Defendant's alleged violation of New Hampshire law. This disclosure was in direct violation of the Committee's clear and strict Confidentiality Rule 37(18) which shields all evidence brought before the Committee from disclosure.

The Defendant filed Motions to Quash the indictment and to Suppress the evidence illegally obtained and disclosed to the Attorney General's office. After a hearing on the Motion the Merrimack County Superior Court filed with the New Hampshire Supreme Court an Interlocutory Transfer Without Ruling. The New Hampshire Supreme Court in upholding the actions of the Professional Conduct Committee and deny-

ing the Motion to Suppress disregarded its own Confidentiality Rule and held that the seizure of the probate estate file from Defendant without a search warrant and without his consent did not violate his fourth amendment rights against unreasonable searches and seizures.

The questions before this Court are:

I. Whether the Defendant's fourteenth amendment due process rights were violated by the New Hampshire Supreme Court's disregarding the plain and unambiguous language and protections of its own confidentiality rule and the retroactive application thereof to this case.

II. Whether the Committee's seizure of the probate file and subsequent disclosures to the Attorney General's office without a search warrant and without Defendant's knowledge or permission constituted a violation of his fourth amendment rights against unreasonable search and seizure.

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Opinion Below.

State v. Merski, N.H. Slip Op. (October 14, 1981) __ A.2d __ (1981).

Jurisdiction.

The order of the Supreme Court of New Hampshire remanding the case of the petitioner to the Merrimack County Superior Court for trial was entered on October 14, 1981. This petition was entered within sixty (60) days from the decision of the Supreme Court of New Hampshire in accordance with Supreme Court Rule 20.1. This Court has jurisdiction of the case pursuant to 28 U.S.C. § 1257(3).

This case presents genuine issues and questions of federal law on which the New Hampshire Supreme Court has made a final decision and for which review by this Court is proper at the present stage of the proceedings. The New Hampshire Supreme Court has adjudicated with finality various issues regarding federal questions in the present case. The Court has held that the Defendant's fourth amendment rights against illegal search and seizure were not violated and that his fifth amendment rights against self-incrimination were also not violated. The Court, by its ruling on the scope and interpretation of its own confidentiality rule, has also held that such retroactive broadening of the application of the confidentiality rule does not violate the Defendant's fourteenth amendment rights of due process. All of these issues present federal questions on which the highest court in New Hampshire has made a final decision.

Although the New Hampshire Supreme Court's decision was based on an Interlocutory Transfer Without Ruling from the state trial court regarding motions to quash the indictment and a motion for suppression of testimony and evi-

dence, and the Defendant's criminal trial has not yet been completed, the federal issues presented can properly be considered by this Court at the present time. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) this Court set forth four categories of cases in which it will consider a state court's decision on federal questions to be ripe for review regardless of the procedural posture of the case.

Under *Cox Broadcasting* this Court will review State Supreme Court decisions on federal issues in cases "in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive of the outcome of the proceedings preordained." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 479. Granting of the motion to suppress evidence and testimony in the present case would be dispositive of the case since all of the evidence relevant to Defendant's prosecution is tainted by the Professional Conduct Committee's violation of its own rules and of Defendant's fourth amendment rights. Therefore, under the doctrines established in *Cox Broadcasting*, the present case is properly before this Court because it presents important questions involving federal constitutional rights and is ripe for consideration.

Constitutional Provisions Involved.

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment XIV, § 1:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions Involved.

New Hampshire Supreme Court Rule 37(18)

> (18) Confidentiality.
>
> (a) Proceedings Alleging Misconduct. All records and proceedings involving allegations of misconduct by an attorney shall be confidential and shall not be disclosed except:
>
> (1) When the prosecution of formal charges is initiated by the filing of a petition with the New Hampshire Supreme Court, in which case, except as is pro-

vided by section 10 regarding resignations, the pleadings, all information admitted at the proceedings, the proceedings themselves (other than deliberations of the supreme court, and the decision, shall be public; or

(2) When an attorney seeks reinstatement pursuant to section 13, in which case the proceedings before the committee shall be conducted the same as prescribed in subsection (1); or

(3) When no prosecution of formal charges is initiated but private discipline is imposed by the committee and the attorney/respondent appeals, in which case the matter shall be conducted the same as prescribed in subsection (1); or

(4) When the attorney/respondent, prior to the filing of formal charges, requests that the matter be public, in which case the entire file, other than the work product and internal memoranda of the committee, shall be public; or

(5) If the investigation is predicated upon a conviction of the respondent for a crime or upon public discipline imposed upon the respondent in another jurisdiction, in which case the entire file pertaining to the crime or the public discipline, other than the work product and internal memoranda of committee, shall be public.

(b) Proceedings Alleging Disability. All proceedings involving allegations of disability on the part of an attorney shall be kept confidential until and unless the supreme court enters an order suspending said attorney from the practice of law pursuant to section 9, in which case said order shall be public.

(c) Protective Orders. Proceedings involving allegations of misconduct by or the disability of an attorney/

respondent frequently require the disclosure of otherwise confidential or privileged information concerning the complainant or a witness. In order to protect the interests of the complainant or the witness, the hearing committee to whom formal prosecution of an allegation of misconduct by or disability of an attorney/respondent is assigned, or the committee in cases considered by it directly without reference to a hearing committee, may, upon application to the supreme court and for good cause shown, obtain a protective order prohibiting the disclosure of such information and directing that the proceedings be so conducted as to implement the order.

(d) Disclosure to Authorized Agency. The committee may disclose relevant information that is otherwise confidential to agencies authorized to investigate the qualifications of judicial candidates, to agencies investigating qualifications for admission to practice, and to law enforcement agencies investigating qualifications for government employment. If the committee decides to answer a request for relevant information, and if the attorney/respondent who is the subject of the request has not signed a waiver permitting the requesting agency to obtain confidential information, the committee shall send to the attorney/respondent at his last known address, by certified mail, a notice that information has been requested and by whom, together with a copy of the information that the committee proposes to release to the requesting agency. The committee shall inform the subject attorney/respondent that the information shall be released at the end of ten (10) days from the date of mailing the notice unless the attorney/respondent obtains a court order restraining such disclosure.

(e) Disclosure to National Discipline Data Bank. The clerk of the supreme court shall transmit notice of all

public discipline imposed on an attorney by the supreme court, or the suspension from law practice due to disability of an attorney, to the National Discipline Data Bank maintained by the American Bar Association.

(f) Duty of Participants. All participants in the proceedings shall conduct themselves so as to maintain the confidentiality mandated by this rule. Violation of this duty shall constitute an act of contempt of the supreme court.—Amended March 5, 1980.

New Hampshire Supreme Court Rule 37(10):

(10) Resignations By Attorney Under Disciplinary Investigation:

(a) An attorney who is the subject of an investigation into the allegations of misconduct on his part may submit his resignation by delivering to the committee an affidavit stating that he desires to resign and that:

(1) his resignation is freely and voluntarily rendered; he is not being subjected to coercion or duress; he is fully aware of the implications of submitting his resignation;

(2) he is aware that there is presently pending an investigation into allegations that he has been guilty of misconduct the nature of which he shall specifically set forth;

(3) he acknowledges that the material facts upon which the complaint is predicated are true; and

(4) he submits his resignation because he knows that if charges were predicated upon the misconduct under investigation he could not successfully defend himself again them.

(b) Upon receipt of an affidavit, the committee shall file it with the court and the court may take such action as it deems necessary.

(c) The contents of an affidavit of an attorney filed in support of his resignation from the Bar shall not be disclosed publicly or made available for use in any other proceeding except on order of the court.

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OCTOBER TERM, 1981.

LEONARD J. MERSKI,
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v.

STATE OF NEW HAMPSHIRE,
RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

Jurisdictional Statement.

Statement of Case.

On October 31, 1978, the Attorney General of the State of New Hampshire received a letter from the Chairman of the New Hampshire Supreme Court's Committee on Professional Conduct (Committee), Robert Raulerson, Esquire, that disclosed certain information discovered by the Committee after the resignation with prejudice of Defendant Leonard J. Merski from the New Hampshire Bar. This disclosure related to allegedly criminal conduct by the Defendant in his representation of the executrix in a probate matter involving the Wells Estate. The investigation by the Attorney General's office which ultimately led to Defendant's indictment for viola-

tion of New Hampshire RSA 637:3 was based on information which the Committee provided to the Attorney General's office in direct violation of the Committee's own strict rules of confidentiality. The facts preceding the disclosure by the Chairman of the Committee of information regarding Defendant's alleged violation of New Hampshire law are:

On August 1, 1978, the New Hampshire Supreme Court, pursuant to its rule 37(10), accepted the resignation with prejudice of Defendant from the New Hampshire Bar and directed the Court's Committee on Professional Conduct to supervise the winding up of the Defendant's law practice. In submitting his resignation with prejudice from the New Hampshire Bar the Defendant relied on the protection of the Committee's confidentiality Rule 37(18) which, with certain exceptions not applicable here, requires strict confidentiality regarding records and proceedings of the Committee involving allegations of misconduct.

On August 4, 1978, Attorney Neil Castaldo, a member of the Committee, learned that the Defendant had not shown up for a probate hearing involving the Wells estate which included $20,000 under Defendant's control. Defendant had not shown up because of the August 1, 1978 order of the New Hampshire Supreme Court. Mr. Castaldo contacted the Administrator of the Committee Wesley Miller, Esquire. Mr. Castaldo testified at the hearing on Defendant's Motion to Suppress that he knew the reasons for Defendant's resignation from the bar and that those reasons played a part in his informing Mr. Miller about the $20,000 in estate funds under Defendant's control.

Mr. Miller later contacted Robert Raulerson, Esq., the Chairman of the Committee and was instructed to pick up the file pertaining to the case. Mr. Miller obtained the file from the Defendant's secretary on August 7, 1978 without first notifying the Defendant or obtaining his permission to take

the file. On this date the Defendant was away from the State of New Hampshire. Mr. Miller, turned the file over to Attorney Bruce Viles, new counsel for the executrix, a week later. At the time Ms. Viles received the file from Mr. Miller, although she was aware of her client's fears that money might be missing from the estate, she did not discuss that matter directly with Mr. Miller. Rather, she asked for "some instruction from his Committee" as to her duties.

In response to the inquiry from Attorney Viles as to what her duties were, the Committee informed Ms. Viles that she was required—as a matter of professional conduct—to report on any possible irregularities or other problems in the account of the probate estate.[1] She did so by a lengthy letter dated October 20, 1978. Attached to her letter were certain documents in support of her allegations of misconduct contained in the letter.[2]

Directly after it received the response from Ms. Viles, the Committee, in violation of its rules, disclosed the allegations of misconduct by the Defendant to the New Hampshire Attorney General's Office. On October 31, 1978, Mr. Raulerson, the Chairman of the Committee, wrote to the Attorney General.[3] He acknowledged the Committee's involvement "in July and August ... in a investigation" of Defendant, and referred the Attorney General to Ms. Viles for "detailed information" concerning possible defalcation of estate funds.[4]

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[1] See, Letter to Attorney Bruce Viles from Wesley Miller dated August 17, 1978 at Appendix D.

[2] See, Letter to Wesley Miller from Bruce Viles dated October 20, 1978 at Appendix D.

[3] See, Letter to Thomas Roth, Attorney General, State of New Hampshire from Robert A. Raulerson dated October 31, 1978; letter to Mr. Raulerson from Mr. Roth dated November 2, 1978 and letter from Mr. Raulerson to Mr. Roth dated November 6, 1978 at Appendix D.

[4] Mr. Raulerson testified that it was the policy of the Committee under his Chairmanship not to proceed on disciplinary matters but

Ms. Viles was later contacted by and met with Mr. Arthur P. McDeed, an investigator in the Attorney General's Office; Mr. McDeed later obtained photocopies of her files which formed the basis of the evidence presented to the Grand Jury. The entire investigation, as testified to by Mr. McDeed at the hearing on the Motion to Suppress, was based on the information first provided by Mr. Raulerson and later by Ms. Viles. This information was the sole source of the investigation which ultimately led to Defendant's indictment by the Merrimack County Grand Jury on January 2, 1979.

It is Defendant's contention that the disclosures by the Committee constituted a violation of its own strict rule of confidentiality 37(18) that requires suppression of certain evidence and other matters which the Committee disclosed to the Attorney General. Prior to trial, the Defendant filed certain motions to quash the indictment and to suppress evidence and testimony. A hearing on these motions was held on April 14 and 15, 1980 and as a result, the Merrimack County Superior Court filed with the New Hampshire Supreme Court an Interlocutory Transfer Without Ruling. On October 14, 1981, the New Hampshire Supreme Court held that the Motions to Quash Indictment and the Motions to Suppress Evidence and Testimony should be denied and remanded the case to the Merrimack County Superior Court for trial. See, *State v. Merski*, N.H. Slip Op. (October 14, 1981), attached hereto as Appendix A. In doing so, the Court retroactively changed and refused to follow its own clear rules of confidentiality regarding investigations by the Professional Conduct Committee. The Court also held that Defendant's fourth amendment rights against unreasonable search and seizure and his fifth amendment rights against self-incrimination were not violated.

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to report to law enforcement authorities and await consummation of criminal proceedings. This was done, he testified, for budgetary reasons. See excerpt of Mr. Raulerson's testimony at Appendix C.

Argument.

I. The New Hampshire Supreme Court, By Disregarding the Plain and Unambiguous Language of Its Confidentiality Rule 37(18) and Applying Its Interpretation Retroactively to the Defendant, Violated His Right to Due Process of Law.

When the Defendant submitted his resignation and affidavit pursuant to New Hampshire Supreme Court Rule 37(10), he relied on the protections of the confidentiality Rule 37(18), and he continued to rely on the rule's protections thereafter.

Rule 37(18) is clear on its face as to the protections it affords to all New Hampshire lawyers. It provides in relevant part:[5]

> (18) *Confidentiality*
>
> (a) *Proceedings Alleging Misconduct.* All records and proceedings involving allegations of misconduct by an attorney shall be confidential and shall not be disclosed. . . .

As the Court admitted in its opinion, none of the stated exceptions to the New Hampshire Supreme Court's confidentiality rule apply in the present case. The rule on its face provides that the information which the Committee had in its possession at the time of Defendant's resignation and thereafter could not be disclosed. Nevertheless, the New Hampshire Supreme Court has refused in the present case to enforce the rule on the basis that it has the power, where the Court so desires, to disregard its own rules. This may be done, according to the Court, because of its power to make

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[5] The full text of Rule 37(18) is found on page VII.

the rules governing professional conduct. Such action by the Court is, of itself, violative of Defendant's due process rights.

Even if the New Hampshire Supreme Court's decision were viewed as an interpretation of its rule, it is clear that Defendant's rights have been violated. The New Hampshire Supreme Court's strained, retroactive construction of the rule is contrary to the clear and explicit language used in the rule. To place the Court's action in perspective, it is instructive to examine the decisions of other state's courts regarding confidentiality rules in analogous circumstances. In states which have confidentiality rules, it is clear that attempts to avoid them have met with strict treatment. For example, in the case of *Molloy v. Whitmer*, 519 S.W. 2d 825 (Ky. 1975), the Commonwealth's attorney sought, by writ of mandamus, the Kentucky Bar Association's disciplinary records concerning a specific member of the Bar for the purpose of determining whether the attorney had violated any provisions of Kentucky's criminal statutes. The Kentucky Supreme Court, in a terse *per curiam* opinion denying the request stated:

> It is essential that the records of a disciplinary proceeding conducted by the bar association with respect to one of its members be privileged against intrusion. Prosecuting authorities must exercise their own investigative resources without invading the confidentiality of the association's disciplinary files.

519 S.W. 2d at 825.

The Kentucky Supreme Court's decision in *Molloy* underscores the unprecedented and unexpected nature of the New Hampshire Supreme Court's retroactive "amendment" of its rule to justify the improper disclosure already made by its Committee on Professional Conduct. By so doing, the Court has rewritten the rule, applied it retroactively and allowed the information gained by the Committee and subject to the

confidentiality guarantee to be used to form the basis for a criminal prosecution of the Defendant.

This state of facts is closely analogous to the situation posed in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). In *Bouie* this Court held a South Carolina Criminal statute violative of due process on vagueness grounds. The statute at issue in *Bouie*, like the rule at issue here, was clear and precise on its face; the South Carolina Supreme Court's construction of it in a fashion which broadened its application retroactively to uphold the conviction of defendants who could not have reasonably believed the Statute proscribed their actions at the time they engaged in them, was properly overturned by this Court at 378 U.S. 352:

> When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. . . . There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforseeable and retroactive judicial expansion of narrow and precise statutory language.

In addition to *Bouie*, this Court has held in other contexts that when a statute or rule is clear on its face and it is given a different gloss which broadens its scope, it must not be given retroactive effect. *Douglas v. Buder*, 412 U.S. 430 (1973); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

The New Hampshire Supreme Court's interpretation of its confidentiality rule has severely restricted the scope of its protection, made the lawyer resignation process and the Committee's duties most ambiguous, and has broadened the circumstances under which disciplinary information can be

disclosed to law enforcement authorities. Most importantly, in the context of the present case, the Court has applied its new interpretation retroactively to validate the actions of the chairman of its professional conduct committee. The Court's action has resulted in the retroactive application of a new rule to the Defendant; as such, it constitutes a violation of his due process rights guaranteed under the Fourteenth Amendment to the United States Constitution.

In support of its opinion regarding the confidentiality rule, the New Hampshire Supreme Court stated: "the power which establishes such rules in the first instance also enables the courts to disregard such rules and adopt the methods most suitable to the occasion" *State v. Merski*, N.H. Slip Op. at A-8, *quoting In re Disbarment Proceedings*, 321 Pa. 81, 101 A. 59, 68 (1936). Use of such precedent, however, is inapposite as it relates to defendants due process rights in this case, a criminal proceeding, for two reasons. First, the Pennsylvania decision predates the *Bouie* decision of this Court and was rendered at a time when procedural due process doctrines were essentially undeveloped. Second, the Pennsylvania decision was rendered in the context of an Administrative Bar disciplinary proceeding—not a criminal trial where the defendant's liberty is at stake. It is clear in the present case that the New Hampshire Supreme Court's admitted disregard of the confidentiality rule is a violation of Defendant's fourteenth amendment due process rights in the context of this criminal proceeding. It is exactly this rare type of case where *Bouie's* prohibition on retroactive reinterpretation and application of a statute or rule is squarely applicable.

II. The Committee's Seizure of the Wells Estate File from Defendant's Secretary without His Knowledge or Permission and Without A Search Warrant Violated His Fourth Amendment Rights Against Unreasonable Searches and Seizures.[6]

The New Hampshire Supreme Court's opinion refers to numerous trial court findings in support of its conclusion that the Defendant's fourth amendment rights were not violated. The Defendant does not challenge the trial court's findings but does assert that they do not inescapably lead to the conclusion of the State Supreme Court. The New Hampshire Supreme Court stated specifically:

> The record supports the court's finding that no evidence or information came to the attention of the attorney general's office except what was provided by Attorney Viles and her client subsequent to Viles' letter dated October 20, 1978. The file had been turned over to Mr. Miller more than two months prior to that date. The defendant had not objected to the transfer, but rather acknowledged and tacitly agreed to it in his letter of August 10, 1978. Furthermore, the file had not been examined by anyone before it was delivered to the representative of the estate.
>
> The court further found that Attorney Viles was not an investigatory agent for the Committee but was merely following its suggestion that she discharge her duty

[6] Although the trial court did not specifically transfer the question of a possible fourth amendment violation by the Committee to the New Hampshire Supreme Court, the parties briefed the issues and the Court considered the question in the interest of judicial economy. *State v. Merski*, N.H. Slip Op. at A-13. Although the parties did not brief the issue of possible violation of Defendant's fifth amendment rights, the Court considered the issue *sua sponte*.

> and responsibility as an attorney in reporting anything relating to the Committee's own concern about professional conduct.

State v. Merski, N.H. Slip Op. at A-15 (October 14, 1981).

Notwithstanding the above stated facts, it is clear that Defendant's fourth amendment rights against unreasonable search and seizure were violated. First, the Defendant had sufficient standing to support his claim that a search warrant was required before the committee could obtain the Wells Estate file. It is instructive to note that the Court did not discuss standing in its opinion and proceeded to the substantive fourth amendment question. It appears that the Court implicitly assumed standing existed. That the defendant did have standing to assert a fourth amendment violation of his rights against unreasonable search and seizure is made clear by the facts. It should first be noted that the file, at the time of seizure, was in Defendant's possession at his residence-office. This fact alone, given the holding in *Chapman v. United States*, 365 U.S. 610 (1961), is sufficient to meet the State's objection as *Chapman* stands for the general proposition that a Defendant with a present possessory interest in the premises searched has standing to challenge the search. Additionally, and with respect to the file itself, it is clear that Defendant had a then-present possessory interest. Defendant had not been required by the Committee to deliver the file and did not voluntarily impart possession to the Committee; because seizure of the file could have—and did—lead to the material contained in it and the fruits of that material being used against Defendant, he had an interest in the file and the premises where it was located sufficient to trigger the Fourth Amendment's protection against unreasonable and unlawful searches and seizures.

On the issue of Defendant's consent to the search, the New Hampshire Supreme Court made much of Defendant's

August 10, 1978 letter to the Committee as an indication of his consent to the seizure by Mr. Miller of the Wells Estate file. Yet, other facts belie the appropriateness of that conclusion. When Mr. Miller seized the file, he obtained it from Defendant's secretary without Defendant's knowledge or consent. Any objection to the seizure on August 10, 1978 would have been futile, as the file had been seized on August 7 while the Defendant was out of the state. Certainly, Defendant's failure to object to the seizure in his August 10, 1978 letter cannot reasonably be characterized as a tacit waiver of his constitutional rights as they had already been violated at that point. Even if assumed for purposes of argument that the August 10, 1978 letter was a waiver of his rights, the Defendant did not make a "knowing and intelligent" waiver of his rights as any waiver would have been based upon his reliance on the confidentiality rule which shielded the information from disclosure to the Attorney General's Office by the Committee. The Defendant could not have known at that time that the New Hampshire Supreme Court would later disregard and retroactively amend its rules to justify the Committee's improper conduct. Any tacit waiver attributed to the August 10, 1978 letter would, therefore, be vitiated since Defendant's waiver could not have been a "knowing and intelligent" one. *See, e.g., Brewer v. Williams*, 430 U.S. 387 (1977) (waiver of right to counsel must be made "knowingly and intelligently").

The Court also relied on trial court findings that no one from the Committee actually searched the file and that Attorney Viles was not an investigatory agent of the Committee. Nevertheless, it is clear that the information she ultimately revealed to the Attorney General was the "fruit" of the information in the Wells Estate file which the Committee seized without Defendant's knowledge and permission and turned over to Attorney Viles. The fact that no one from

the Committee actually searched the file is irrelevant since Mr. Miller's seizure of the file led directly to Chairman Raulerson's improper disclosure to the Attorney General. The original illegal seizure of the Wells Estate file by Mr. Miller, and his admonitions to Attorney Viles, were essential links in the chain of events which led directly to the Grand Jury's indictment of the Defendant. Since the original seizure was an illegal one, all information gained from the file—including the information transmitted first to the Committee and then to the Attorney General in Ms. Viles' October 20, 1978 letter was tainted as the fruit of the Committee's illegal seizure of the file. *See, Davis v. Mississippi*, 394 U.S. 721 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

In its decision, the New Hampshire Supreme Court refused to invoke the exclusionary rule for two reasons: first, because of its characterization of the activities of the Committee as bar disciplinary action and not the enforcement of criminal laws, and second, because the receipt of the information "was not the consequence of any illegal conduct on the part of the police." *State v. Merski*, N.H. Slip Op. at A-15.

For reasons that are not at all clear, the Court's opinion failed to recognize that the Committee's improper action led directly to the state Attorney General's investigation and the Grand Jury indictment of the Defendant on criminal charges. The Motion to Suppress and the exclusionary rule upon which the Motion was based are asserted not in the context of a bar disciplinary action, as the Court suggested they were, but rather in a criminal case in the Merrimack County Superior Court. The exclusionary rule, therefore, applies with full force.

Second, the fact that the search was not made by the police does not cure its constitutional infirmity. The fourth amend-

ment as incorporated by the fourteenth amendment and made applicable to the states protects citizens from unreasonable searches and seizures by the state. *See, Mapp v. Ohio*, 367 U.S. 643 (1961). The Committee, when it seized the Wells Estate file, acted pursuant to the authority of the New Hampshire Supreme Court, a constitutionally ordained branch of the government of the State of New Hampshire. Further, the Committee's disclosure of its proceedings concerning allegations of misconduct on the part of the Defendant was pursuant to its duties as an arm of the New Hampshire Supreme Court. It is clear that the Committee's actions were those of the State of New Hampshire.

Even if the Committee's seizure of the Wells Estate file were characterized as a so-called administrative search, it is now the general rule that such searches must be conducted pursuant to a search warrant. *Marshall B. Barlow's, Inc.*, 436 U.S. 307 (1978). *See, Michigan v. Tyler*, 436 U.S. 499 (1978).

It is thus clear, in the present case, that the Defendant had a sufficient possessory interest in the Wells Estate file to implicate the fourth amendment requirement that the Committee's seizure of the file be made pursuant to a search warrant. Since no warrant was obtained, the Committee's seizure of the file was unreasonable and suppression is appropriate. See, *Camara v. Municipal Court*, 387 U.S. 523 (1967).

Conclusion.

This Petition raises substantial federal questions dealing with the Defendant's due process rights under the fourteenth amendment to United States Constitution and his right as a

criminal Defendant to suppress evidence obtained in violation of his fourth amendment rights against unreasonable search and seizure. Pursuant to Supreme Court Rule 17.1(c) this Court should consider the questions presented since the New Hampshire Supreme Court has decided important federal questions of federal law in a way which conflict with applicable decisions of this Court.

Respectfully submitted,

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December 13, 1981

Appendix A.

NOTICE: This Opinion is subject to formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors, other than obvious typographical errors, in order that corrections may be made before the Opinion goes to press. THE CONTENTS OF THIS OPINION MAY BE DISCLOSED AT OR AFTER 8:00 A.M. ON THE DATE THE OPINION BEARS. IF THE OPINION IS RECEIVED BEFORE THAT TIME AND DATE, ITS CONTENTS MUST BE KEPT CONFIDENTIAL.

THE SUPREME COURT OF NEW HAMPSHIRE

Merrimack
No. 80-341

THE STATE OF NEW HAMPSHIRE

v.

LEONARD J. MERSKI

October 14, 1981

Gregory H. Smith, attorney general (*Andrew R. Grainger* and *Michael A. Pignatelli*, assistant attorneys general, on the brief, and *Mr. Grainger* orally), for the State.

Sheehan, Phinney, Bass & Green P.A., of Manchester (*W. Michael Dunn* and *Stephen E. Weyl* on the brief, and *Mr. Weyl* orally), for the defendant.

PER CURIAM. This is an interlocutory transfer by the Superior Court (*Souter*, J.) of questions posed in several motions filed by the defendant.

The first motions seek to suppress evidence and testimony as being tainted by an alleged breach of our Rule 37(18),

which requires that all records and proceedings involving allegations of misconduct by an attorney remain confidential. We hold that a breach of confidentiality, if any, by this court's Professional Conduct Committee (Committee) does not render the proposed evidence and testimony inadmissible in a subsequent prosecution of the defendant for theft under RSA ch. 637.

The other motions filed by the defendant seek to quash his indictment on the basis that it is insufficient and unconstitutionally vague. We hold the indictment to be sufficient.

The defendant Merski, an attorney whose affairs were being inquired into by the Committee, resigned with prejudice from the bar under our Rule 37(10). On August 1, 1978, by order of this court, the resignation was accepted, and the Committee was ordered to obtain the defendant's files and to supervise the winding up of his law practice. *See* Supreme Court Rule 37(14)(h), 37(15)(a).

On August 4, 1978, a hearing on a petition for an accounting of the Wells estate, which the defendant represented, was continued by the probate court because Merski had resigned from the bar and was not present in court. This action was reported to both the chairman of the Committee, Mr. Raulerson, and to its administrator, Mr. Miller. At that time, no committee member knew the specific facts regarding the Wells estate or that irregularities might have occurred in the handling of estate funds. Mr. Miller, who since the August 1 court order had attempted to contact the defendant to make arrangements to take possession of all files, was requested by Mr. Raulerson to obtain the Wells file and to deliver it to whoever would assume representation of the estate. That same day, Attorney Bruce E. Viles requested the file, and Mr. Miller told her that it would be delivered to her upon production of written authorization from the executrix of the estate.

On August 7, 1978, Mr. Merski's secretary turned over the Wells file to Mr. Miller, who requested it pursuant to this court's order. Without examining it, he placed it in the trunk of his car. On August 10, 1978, Merski wrote to Miller indicating that he had spoken to Mrs. Viles, that she would have an authorization from her client to pick up the file, and that he, Merski, had arranged to meet with her and provide her with whatever assistance she might need. On August 14, 1978, Miller delivered the file to Viles, who expressed concern about the extent of her responsibility to anyone beyond her client.

Mr. Miller, by letter to Mrs. Viles dated August 17, 1978, noted that the estate was of "continuing interest" to the Committee and that there were "concerns . . . as to funds." He instructed her to bring to the Committee's attention "any indication of defalcation" and cited DR 1-103(A) and (B) of the Code of Professional Responsibility (Disclosure of Information to Authorities).

On October 20, 1978, Mrs. Viles wrote to Mr. Miller and reported an alleged misappropriation by the defendant of nearly $6,000 of estate funds. Mr. Raulerson was notified, and he, in accordance with the policy of the Committee, "took no action in a case involving a charge of commission of a crime until after the prosecutorial authority ha[d] investigated it and, if appropriate, prosecuted." However, on October 31, 1978, he wrote the attorney general stating that it had come to the Committee's attention that Mr. Merski may have committed forgery and embezzlement in handing funds of the Wells estate. He referred the attorney general to Mrs. Viles for further information.

When an investigator for the attorney general's office sought information from the Committee, Mr. Miller refused to supply any on grounds of confidentiality under our Rule 37(18), which reads in pertinent part as follows:

"(18) *Confidentiality.*

(a) *Proceedings Alleging Misconduct.* All records and proceedings involving allegations of misconduct by an attorney shall be confidential and shall not be disclosed. . . .

. . . .

(d) *Disclosure to Authorized Agency.* The committee may disclose relevant information that is otherwise confidential to agencies authorized to investigate the qualifications of judicial candidates, to agencies investigating qualifications for admission to practice, and to law enforcement agencies investigating qualifications for government employment. If the committee decides to answer a request for relevant information, and if the attorney/respondent who is the subject of the request has not signed a waiver permitting the requesting agency to obtain confidential information, the committee shall send to the attorney/respondent at his last known address, by certified mail, a notice that information has been requested and by whom, together with a copy of the information that the committee proposes to release to the requesting agency. The committee shall inform the subject attorney/respondent that the information shall be released at the end of ten (10) days from the date of mailing the notice unless the attorney/respondent obtains a court order restraining such disclosure.

. . . .

(f) *Duty of Participants.* All participants in the proceedings shall conduct themselves so as to maintain the confidentiality mandated by this rule. Violation of this duty shall constitute an act of contempt of the supreme court."

On January 2, 1979, a grand jury indicted the defendant for theft. RSA ch. 637. The defendant filed several motions to

quash the indictment and to suppress evidence and testimony. A hearing on the motions was held on April 14 and 15, 1980, and the trial court transferred to this court the following:

> "Questions raised by the Motion to Suppress.
>
> I. Did the letter from Mr. Raulerson to the Attorney General dated October 31, 1978 contain a disclosure of information about a record of proceeding forbidden by Supreme Court Rule 37(18)?
> II. If the answer to question I is yes, is the evidence obtained by the State as a result of that disclosure subject to a motion to suppress and does the defendant have standing to make such a motion?
>
> Questions raised by the Motion to Quash.
>
> I. Is the indictment charging theft by obtaining unauthorized control with a purpose to deprive defective for omitting a reference to one of the alternative definitions of "purpose to deprive" contained in RSA 637:2, III?
> II. If the answer to question I. is yes, may the defect be cured by the State's electing to rely on a given definition from among the statutory alternatives, as it has done in this case?"

On November 6, 1980, the State reindicted Merski, asserting that the new indictment was identical to the original one except that it cured an alleged defect of lack of specificity. Presumably because the case was on appeal before us, the State on November 7, 1980, filed a "motion to substitute" with this court. It recited that the granting of this motion would remove the issue of specificity from our consideration. On November 10, 1980, the defendant objected to the "motion to substitute" on the ground that he might be "prejudiced

by never having an opportunity to object to the second indictment in the superior court."

On December 8, 1980, we denied, without prejudice, the State's "motion to substitute." We remanded the case for the limited purpose of consideration by the superior court of any similar motion the State might elect to file. On December 11, 1980, the State filed a "motion to substitute" in the superior court. No objections having been filed, *Souter*, J., on January 12, 1981, granted the State's motion. On January 23, 1981, the defendant filed with us a motion for limited remand for the purpose of allowing him to object to the State's "motion to substitute." We granted the defendant's motion on January 30, 1981, and remanded for a prompt consideration and ruling on the merits of the motion.

On February 5, 1981, the defendant filed in the superior court a motion to quash the indictment of November 6, 1980, and in opposition to the substitution of that indictment for the indictment dated January 2, 1979. The defendant claimed that the second indictment was insufficient, vague, and violative of his rights guaranteed under the United States and New Hampshire Constitutions.

On February 25, 1981, *Souter*, J., entered an order which in pertinent part reads as follows:

> "Oral motion by defendant for reconsideration of order of January 12, 1981, granting State's motion to substitute is granted. Motion to quash is denied; order of January 12, 1981 granting State's motion to substitute is affirmed, each subject to exception. I find second indictment is in effect an amendment of the first.
>
> *THE CASE SHALL BE TRANSFERRED AGAIN TO THE SUPREME COURT.*"

We interpret this order to include resubmission to us of the questions originally posed.

We discuss first the defendant's claim that a breach of confidentiality by the Professional Conduct Committee renders the proposed evidence and testimony inadmissible in his prosecution. Technically, the disclosure by Mr. Raulerson may be interpreted to have been impermissible because it did not fall within the exceptions contained in Rule 37(18). We hold, however, that such a disclosure did not require the drastic remedy of suppression or exclusion.

We have long held that an attorney is "an officer of the court, and subject to the control of the court, which has summary powers of investigation.... 'The public is entitled to ample protection against the danger of any abuse of the great powers of the office which the public ... has conferred upon him.' " *Welanko's Case*, 99 N.H. 413, 414, 112 A.2d 50, 51 (1955) (quoting *Delano's Case*, 58 N.H. 5, 6 (1876)). "The public and the bar of this state are entitled to be assured that the practice of law is a profession which demands that its members adhere to fiduciary standards of conduct and that the failure to do so will result in expeditious disciplinary action." *Broderick's Case*, 104 N.H. 175, 179, 181 A.2d 647, 650 (1962).

"This court has the inherent power to take reasonable and expeditious action in the suspension or removal of members of the bar for the protection of the community ... In the exercise of this power this court has the obligation to make appropriate disciplinary orders 'for the protection of the public, as well as for the maintenance of public confidence in the bar as a whole.' " *Barnard's Case*, 101 N.H. 33, 34, 131 A.2d 630, 630-31 (1957) (quoting *Welanko's Case*, 99 N.H. 413, 414, 112 A.2d 50, 51 (1955)); *see Ford's Case*, 102 N.H. 24, 25, 149 A.2d 863, 864 (1959); *Harrington's Case*, 100 N.H. 243, 244, 123 A.2d 396, 396 (1956).

The Pennsylvania Supreme Court has held that: "It is the right and duty of a court to discipline its members who

appear before it guilty of wrongdoing. Courts have an inherent power to make and follow rules governing such matters or to formulate new rules as the case demands so long as no right of the member charged is invaded. But the rules thus established do not restrict the general power of the courts; *the power which establishes such rules in the first instance also enables the courts to disregard such rules and adopt the methods most suitable to the occasion.*" (Emphasis added.) *In re Disbarment Proceedings*, 321 Pa. 81, 101, 184 A. 59, 68 (1936) (citations omitted); *see McLaughlin v. Philadelphia Newspapers, Inc.*, 348 A.2d 376, 380-81 (Pa. 1975).

The purpose of lawyer discipline is not to punish the attorney, but to maintain appropriate standards of professional conduct for the protection of the public and the maintenance of public confidence in the bar. By removing from the profession a person whose misconduct has proved him unfit to be entrusted with the duties and responsibilities belonging to the office of an attorney, the public and those charged with the administration of justice are protected. *Silverstein's Case*, 108 N.H. 400, 401-02, 236 A.2d 488, 490 (1967); *accord Emslie v. State Bar*, 11 Cal. 3d 210, 225, 520 P.2d 991, 999, 113 Cal. Rptr. 175, 183 (1974); *State v. Turner*, 217 Kan. 574, 581, 538 P.2d 966, 973 (1975); *Attorney Grievance Comm'n v. Kahn*, 431 A.2d 1336, 1351 (Md. 1981); *see Wholey's Case*, 110 N.H. 449, 450-51, 270 A.2d 609, 610 (1970); 7 Am. Jur. 2d *Attorneys at Law* § 26 (1980).

Disciplinary proceedings "are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice. . . . Thus the real question at issue in a disbarment proceeding is the public interest and an

attorney's right to continue to practice a profession imbued with public trust." *In re Echeles*, 430 F.2d 347, 349-50 (7th Cir. 1970) (citations omitted); *see In re Daley*, 549 F.2d 469, 474-75 (7th Cir.), *cert. denied sub nom. Daley v. Attorney and Disciplinary Comm'n*, 434 U.S. 829 (1977); *State v. Turner*, 217 Kan. 575, 581, 538 P.2d 966, 973 (1975).

Disbarment and suspension proceedings are *sui generis*, not civil, or criminal or administrative in nature, but special in character, *resulting from the inherent power of courts and to which not all of the ordinary procedural safeguards apply. Yokozeki v. State Bar*, 11 Cal. 3d 436, 447, 521 P.2d 858, 865, 113 Cal. Rptr. 602, 609, *cert. denied*, 419 U.S. 900 (1974); *see Erdmann v. Stevens*, 458 F.2d 1205, 1208-09 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972); *In re March*, 71 Ill. 2d 382, 395-96, 376 N.E.2d 213, 218-19 (1978); *In re Grievance Procedures*, 115 N.H. 310, 312, 341 A.2d 272, 273 (1975); *cf. In re Ruffalo*, 390 U.S. 544, 550 (1968); *Polk v. State Bar*, 480 F.2d 998, 1001 (5th Cir. 1973); *Office of Disciplinary Counsel v. Campbell*, 345 A.2d 616, 620 (Pa. 1975), *cert. denied sub nom. Campbell v. Disciplinary Bd.*, 424 U.S. 926 (1976). *See generally* A.B.A. Joint Commission on Professional Discipline, Standards for Lawyer Discipline and Disability Proceedings (Approved Draft, 1979).

With these basic premises in mind, we now address the alleged breach of confidentiality. The defendant claims that the investigation and the instigation of the criminal prosecution resulted directly from activities of the Committee. He asserts that the chairman's October 31, 1978 letter to the attorney general directing attention to the "committee sponsored" Viles report was a breach of the confidentiality rule. Furthermore, based on *Spevack v. Klein*, 385 U.S. 511 (1967), he vaguely claims a violation of the Federal Constitution's fifth amendment protection against self-incrimination. He finally argues that if the Committee had respected his right

to confidentiality, the present case might never have developed. He reasons and concludes that "defendant's prosecution based on evidence obtained by the State as a direct result of the [confidentiality] violation makes suppression appropriate."

Defendant's principal argument seems to be grounded in the false premise that confidentiality is the "defendant's right" alone. *See In re Grievance Procedures*, 115 N.H. at 312, 341 A.2d at 273-74. "[T]he primary purpose underlying the imposition of confidentiality ... is to protect the reputation of an attorney.... A second purpose ... is to protect the anonymity of complainants.... A third purpose ... is to maintain the integrity of pending [g]rievance [c]ommittee investigations." *People v. Pacheco*, 618 P.2d 1102, 1103-04 (Colo. 1980). It has been held that "[t]he privilege is not of the attorney alone but of the State bar. [The attorney] waives it when ... he places his reputation as an attorney in issue. But his waiver does not affect the privilege of the State Bar acting for itself and the public." *Chronicle Pub. Co. v. Superior Court*, 54 Cal.2d 548, 570, 354 P.2d 637, 648, 7 Cal. Rptr. 109, 120 (1960). "[T]here is an equally weighty state interest, namely, that of 'preventing public disclosure that would endanger ... the interests of those from whom [the state] has obtained information on a confidential basis.' " (Citation omitted). *McLaughlin v. Philadelphia Newspapers*, Inc., 348 A.2d 376, 382-83 (Pa. 1975). We note that courts applying rules of confidentiality in judicial inquiry proceedings are in accord. *Mosk v. Superior Court*, 601 P.2d 1030, 1041, 159 Cal. Rptr. 494, 505 (1979); *Illinois Judicial Inquiry Bd. v. Hartel*, 72 Ill.2d 225, 229-38, 380 N.E.2d 801, 803-07 (1978), *cert. denied sub nom. Alfano v. Illinois Judicial Inquiry Bd.*, 440 U.S. 915 (1979).

In discussing evidentiary privileges in New Hampshire, one writer has stated:

> "By creating a system of privileges, most of which may be overridden in situations when a competing public interest demands it, or when the privilege is being used unfairly, the court has . . . achieved the desirable result of recognizing important privileges . . . while . . . ensur[ing] that the privileges will not injure the public interest, or be used to unfair advantage.
>
> . . . The real purpose of any privilege is not to exclude relevant evidence, but simply to facilitate activities which require confidence. The New Hampshire scheme of qualified privilege has achieved this goal while sacrificing as little as possible of the integrity of the litigation process which is, after all, a search for the truth."

McNamara, *The Hierarchy of Evidentiary Privilege in New Hampshire*, 20 N.H.B.J. 1, 27 (1978). This article contains a discussion of numerous privileges and their susceptibility to waiver, including privileges regarding: the attorney-client relationship; the marital relationship (RSA 516:27); self-incrimination (N.H. CONST' Pt. I, art. 15); informers, state secrets; trade secrets; judges; pastoral counsellors (RSA 330-B:15 (Supp. 1979)); the physician-patient relationship (RSA 330-A:19); child abuse (RSA 169:43) and newsmen. *See also* Laws 1981, ch. 367 (adult abuse).

In *Marceau v. Orange Realty, Inc.*, 97 N.H. 497, 500, 92 A.2d 656, 657-58 (1952), we interpreted a confidentiality requirement under the unemployment compensation statute (current version at RSA 282:9-M(2)) and held that:

> "Production of the records and testimony . . . under the circumstances of this case will not expose the witness to the penalties provided by the section. 'The evil intended to be forestalled and prevented by this clause of the statute was the voluntary imparting by State employees of information so acquired. . . . It was not intended to impede the administration of justice in the courts by the suppression of pertinent testimony.'" (Citation omitted.)

In *Opinion of the Justices*, 117 N.H. 386, 388, 373 A.2d 644, 646 (1977), we stated that "[e]ven a statutory privilege is not fixed and unbending and must yield to countervailing considerations...." In the context of the disclosure of medical testimony and records in a recommittal hearing to determine dangerousness (current version at RSA 651:11-a (Supp. 1979)), we stated that "the privileges in question are not absolute and must yield when disclosure of the information concerned is considered essential." *State v. Kupchun*, 117 N.H. 412, 415, 373 A.2d 1325, 1327 (1977); *cf. State v. Thorp*, 116 N.H. 303, 310, 358, A.2d 655, 661 (1976). Therefore even assuming, arguendo, a violation of the confidentiality rule, we are not disposed to impose the exclusionary rule as a means of enforcement.

Based on the confidentiality rule, the defendant also sought, and the State refused to grant him, transactional immunity from possible prosecution that might arise out of any information and evidence obtained from testimony of members of the Committee. The defendant relies on *Spevack v. Klein*, 385 U.S. 511 (1967), for this contention, which he equates to and translates into a fifth amendment protection for himself. He cites no other authority in support of this proposition, and we can find none. His reliance on *Spevack* is misplaced because he overlooks the fact that in that case the Court held that an attorney could not be disbarred for refusing to produce documents in a judicial inquiry into *that attorney's own conduct.* 385 U.S. at 518-19. The *Spevack* holding is in accord with the principle that the privilege against self-incrimination is a personal one and must be invoked by the witness himself. *Rogers v. United States*, 340 U.S. 367, 371 (1951). Furthermore, the privilege applies not only to answers which would support a conviction, but also to those which would furnish a link in the chain of evidence needed to prosecute someone who claims the privilege. *Hoffman v. United States*, 341 U.S. 479, 486

(1951). The fact pattern in the case before us is different from that in *Spevack* and makes the holding therein inapplicable to this case. The choice of whether the defendant testifies in the pending criminal proceedings or properly invokes the fifth amendment privilege is still, of course, his to make.

The defendant also argues that, but for the alleged breach of confidentiality in the disciplinary proceedings, the criminal charge might never have been brought against him. We are not moved by this argument and find it unsound. We endorse and adopt the words used by the Supreme Court of Pennsylvania when, in a slightly different context of double jeopardy, it stated: "If either action would bar the other, the state would be compelled to have in its midst an uncensured attorney who is a convicted criminal or an unpunished criminal who is a disbarred attorney." *Office of Disciplinary Counsel v. Campbell*, 345 A.2d 616, 621 (Pa. 1975), *cert. denied sub nom. Campbell v. Disciplinary Bd.*, 424 U.S. 926 (1976); *see In re Grievance Procedures*, 115 N.H. 310, 312, 341 A.2d 272, 273 (1975). We hold, in sum, that if a breach of our confidentiality rule (Rule 37(18)) occurred, it would not call for the imposition of the drastic remedy sought by the defendant.

The court did not transfer the question, but the parties nevertheless have briefed and argued the issue of suppressing the Wells estate file, which the defendant alleges was unlawfully seized. We usually would not consider such a question at this time, but in the interest of judicial economy we will do so here. *In re Raymond S.*, 121 N.H. , , 430 A.2d 182, 183 (1981); *State v. Pugliese*, 120 N.H. 728, 731, 422 A.2d 1319, 1321 (1980).

The defendant argues that the evidence is tainted because the Committee, as an arm of this court, represented the State when it seized the materials without obtaining a search warrant and in the absence of the defendant. We reject this

attempt to invoke the exclusionary rule and hold that it is not mandated by either the Federal or our State Constitution.

The record supports the court's finding that no evidence or information came to the attention of the attorney general's office except what was provided by Attorney Viles and her client subsequent to Viles' letter dated October 20, 1978. The file had been turned over to Mr. Miller more than two months prior to that date. The defendant had not objected to the transfer, but rather acknowledged and tacitly agreed to it in his letter of August 10, 1978. Furthermore, the file had not been examined by anyone before it was delivered to the representative of the estate.

The court further found that Attorney Viles was not an investigatory agent for the Committee but was merely following its suggestion that she discharge her duty and responsibility as an attorney in reporting anything relating to the Committee's own concern about professional conduct. In any event, we agree with the Fifth Circuit Court of Appeals which stated:

> "[W]hen a [g]rievance [c]ommittee . . . undertakes merely to upbraid a local attorney for conduct deemed to be violative of the ethical standards of the profession . . . it is not in any sense acting in aid of the enforcement of . . . criminal laws. Such administrative action is properly viewed as a simple matter of policing the legal profession to insure that the high standards of professional integrity are maintained. WE see nothing in this sort of regulatory activity which might be construed as an integral part of . . . .[the] enforcement of . . . criminal laws or 'as part of a comprehensive scheme for the enforcement of the . . . [p]enal [c]ode.' " (Citation omitted.) *Polk v. State Bar*, 480 F.2d 998, 1002 (5th Cir. 1973).

As in *Kozerski v. Steere*, 121 N.H. , A.2d (decided June 10, 1981), we fail to see how the facts in this case bring

into play the exclusionary rule. Because the receipt of the information "was not the consequence of any illegal conduct on the part of the police," the rule therefore is not applicable. *Id.*, A.2d . *See generally Emslie v. State Bar*, 11 Cal. 3d 210, 226-30, 520 P.2d 991, 1000-02, 113 Cal. Rptr. 175, 184-86 (1974).

We now address the question of the sufficiency of the substituted indictment. The defendant argues that it fails to allege two essential elements of the crime of theft, specifically that he had a purpose to deprive and that he obtained unauthorized control over the funds. RSA 637:3 I and II. He further argues that the State failed to describe the phrase "substantial portion of its economic value or of the use and benefit thereof would be lost."

The indictment reads:

> "did purposely obtain Five Thousand Nine Hundred Eighty-nine Dollars and Fifty Cents ($5,989.50), the property of Jane W. Brabitz, Executrix of the Estate of Evelyn R. Wells, with a purpose to withhold said money for so extended a period that a substantial portion of its economic value or of the use and benefit thereof would be lost, by withdrawing Five Thousand Nine Hundred Eighty-nine Dollars and Fifty Cents ($5,989.50) from Savings Account No. 01-006408-7 at the Indian Head National Bank, without authority to do so, in violation of New Hampshire Revised Statutes Annotated 637:3 . . . ."

We have held that the description of an offense in the words of the statute does not always meet the constitutional requirement that a fair and full description of the offense must be alleged. *State v. Bussiere*, 118 N.H. 659, 661, 392 A.2d 151, 153 (1978) (citations omitted). An indictment is sufficient if it gives enough information by setting forth all the necessary elements of the offense so that the defendant can prepare for trial and if necessary plead his conviction or ac-

quittal as a bar to further prosecution for the same offense. *State v. Taylor*, 121 N.H. , 431 A.2d 775, 778 (1981). "The test is not whether the information could be more comprehensive and certain. To the contrary, the information need contain only the elements of the offense and enough facts to warn the accused of the specific charges against him." *State v. Manchester News Co.*, 118 N.H. 255, 257, 387 A.2d 324, 327, *appeal dismissed*, 439 U.S. 949 (1978). A reading of the indictment discloses that it clearly meets our standards, and we hold that it is sufficient.

Remanded for trial.

DOUGLAS, BROCK and BATCHELDER, JJ. did not sit; the others concurred; GRIMES, Ret. C.J., sat by special designation pursuant to RSA 490:3.

Appendix B.

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT
June Term
1980

THE STATE OF NEW HAMPSHIRE

v. **No. S-79-1-2**

LEONARD J. MERSKI

INTERLOCUTORY TRANSFER

The Merrimack County Grand Jury returned an indictment charging defendant with a violation of RSA 637:2,I in that he "did purposely obtain unauthorized control over Five Thousand Nine Hundred Eighty-nine Dollars and Fifty Cents ($5,989.50), the property of Jane W. Brabitz, Executrix of the Estate of Evelyn R. Weils, with a purpose to deprive her thereof, by withdrawing Five Thousand Nine Hundred Eighty-nine Dollars and Fifty Cents ($5,989.50) from Savings Account No. 01-006408-7 at the Indian Head National Bank, without authority to do so." Following my refusal to accept defendant's plea of guilty and my appointment of new counsel to represent him, evidence and argument were presented on a series of pretrial motions. These included what in essence is a motion to suppress evidence of a client file, bank and court records, and testimony of an executrix as

tainted by a claimed breach of Supreme Court Rule 37(18) on confidentiality, and a motion to quash the indictment for failure to specify which theory of "purpose to deprive" under RSA 637:2,III, was assumed and charged by the indictment. At defendant's request, I respectfully transfer these motions without ruling. I have ruled upon other pretrial motions, but do not transfer defendant's exceptions in advance of trial.

1. I make the following findings and rulings for the purposes of this transfer. For some time before August 1, 1978, the Committee on Professional Conduct was engaged in inquiring into the affairs of the defendant, Leonard J. Merski. Defendant submitted a resignation with prejudice under Rule 37(10)* to the Supreme Court. By order dated August 1, 1978, the resignation was accepted and the Committee was ordered to supervise the winding up of defendant's practice and, in particular, to obtain the files of defendant's clients. Apart from its responsibility to execute the orders of the Court, the Committee retained an interest in the defendant's affairs because it was possible that the defendant would at some time petition for reinstatement and possible that other facts might later be discovered which would constitute grounds for disbarment.

On August 4, 1978, Malcolm McLane, Esq., attended the Merrimack County Probate Court representing a trustee interested in the estate of the late Evelyn Wells, for the purpose of a hearing on his petition for an accounting. The judge announced that no account had been filed and that no hearing would be held because defendant, who was attorney for the executrix, had just resigned from the Bar and was not present. The interest of Mr. McLane's client was in some $20,000

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* It has been agreed that the rule in effect on the dates in question was identical to present Supreme Court Rule 37 so far as it concerns this case. For convenience, all references to the rule will therefore be to Rule 37.

of estate assets which were under the defendant's control. Mr. McLane did not then believe that the defendant had misapplied any of these assets, but he was concerned at what he believed was the unreasonable length of time which had then been consumed in administration. Mr. McLane returned to his office and told his partner, Neil F. Castaldo, Esq., what had happened at the Probate Court. Mr. Castaldo was a member of the Committee. Mr. Castaldo then passed on this information in the course of a telephone call to Wesley Miller, Esq., Administrator of the Committee. Mr. Miller then called Robert Raulerson, Esq., Chairman of the Committee and gave the same information to him. I am unable to find what Messrs. Castaldo, Miller or Raulerson had known about the defendant's affairs up to this point, for each of them invoked the confidentiality requirement of Rule 37(18) in response to questions that might have elicited such information. I find they did this in response to the defendant's claim of all rights to confidentiality to which he might be entitled under the rule. Mr. Castaldo testified that his knowledge of defendant's disciplinary proceedings and the facts related to it played some part in causing him to pass on to Mr. Miller the information that defendant had had, for a considerable period of time, control over $20,000 which had not been, as of that date, accounted for. Mr. Castaldo had, at the time of his phone call to Mr. Miller, direct knowledge of the reasons for defendant's resignation, and that knowledge also played some part in his decision to communicate with Mr. Miller. Mr. Raulerson testified, however, that he had not heard of the Wells Estate before the call from Mr. Miller, which I have mentioned. I therefore find it is probable that no one on or connected with the Committee knew anything about the Wells Estate or had any particular reason to believe the defendant had committed theft of any of the Wells Estate assets until they were made aware of the letter of Bruce E.

Viles, Esq., to Mr. Miller, dated October 20, 1978, which I will describe below. Mr. Raulerson instructed Mr. Miller to obtain the Wells Estate file and to deliver it to whoever would assume representation of the estate. In the meantime, still on August 4, the executrix had retained new counsel, Bruce E. Viles, Esq. She called Mr. Miller, after he had talked with Mr. Raulerson, and asked for the estate file. Mr. Miller told her he would give her the file when she had produced a written authorization from the executrix.

On the following Monday Mr. Miller called defendant's office, located in his house in Salisbury. Defendant was not there. Mr. Miller told the secretary who answered that he intended to take the Wells Estate file under the authority of the Supreme Court order. When he arrived at the house the secretary gave him the file as contained in a carton. Mr. Miller took no other files at that time. He placed the Wells Estate file in the trunk of his car, and kept it there until he delivered it to Mrs. Viles on August 14. He never examined the file. Neither he nor any member of the Committee obtained any particular information about the Wells Estate beyond what had been disclosed at the Probate Court until Mrs. Viles wrote the letter dated October 20, 1978.

When Mr. Miller delivered the file to her, Mrs. Viles expressed some concern about the extent of her responsibility to anyone beyond her client. Mr. Miller agreed to write to her on this subject and did so by letter dated August 17, 1978. He noted the estate was of "continuing interest" to the Committee, and that there were "concerns . . . as to funds." He instructed her to bring to the Committee's attention any "indication of defalcations" and invoked DR 1-103(A) and (B) of the Code of Professional Responsibility, requiring in effect that a lawyer with unprivileged knowledge of dishonest conduct by another lawyer report this "to a tribunal or other authority empowered to investigate or act upon" such con-

duct, upon his own motion or at the request of the tribunal or authority. Though Mr. Miller did not comment on the requirement of these Disciplinary Rules beyond their reference to the Committee, I believe their reference to "authority" included a reference to the prosecutorial authorities of the State, the offices of the County Attorney and Attorney General. Mr. Raulerson did not see this letter before it was sent, but if he had seen it he would have approved it as correctly representing the policy of the Committee. In any case, I interpret the letter as one intended to furnish authority for Mrs. Viles to act if such action was warranted. I accept the testimony of Mr. Raulerson that it was not the Committee's intention to require Mrs. Viles to act as the Committee's agent in investigating any particular suspected misconduct. Rather, I find it was the Committee's assumption that she would discharge her responsibility as attorney for the estate and that she would report to the Committee anything she learned in so doing if such information should relate to the Committee's own concerns.

On October 20, 1978 Mrs. Viles wrote to Mr. Miller. In response to the reference by Mr. Miller to defalcations, she reported inter alia that bank records indicated that a check of nearly $6,000 had been drawn against the estate account during the time of the defendant's representation of the estate; that the executrix denied either having signed the authorization which bore her purported signature or having authorized the defendant to use estate funds; that the Clerk of the Merrimack County Superior Court had revealed that the check had been used in connection with a case in which defendant had acted as counsel but which was unrelated to the Wells Estate; and that on August 10, 1978 a check payable to the estate and drawn by the defendant was deposited in the estate account.

Thereafter Mr. Miller sent a copy of this letter to Mr. Raulerson. Mr. Raulerson reported to the Committee that he had received the letter, but the Committee did not discuss it. Mr. Raulerson then acted in *accordance with the policy of the* Committee to take no action in a case involving a charge of commission of a crime by a lawyer until after the prosecutorial authority has investigated it and, if appropriate, prosecuted. The Committee does not have resources of its own to perform investigations in such cases generally, though in this case Mr. Miller could probably have investigated sufficiently for the Committee's purposes except for obtaining handwriting analysis. In accordance with the policy, on October 31, 1978 Mr. Raulerson wrote to the Attorney General stating that "[i]n connection with carrying out the Court's assignment, it has come to our attention that Mr. Merski may have committed forgery and embezzlement with respect to his handling of the Estate of Evelyn Wells." He referred the Attorney General to Mrs. Viles for detailed information. Following the Attorney General's reply to this letter Mr. Raulerson asked to be kept abreast of the Attorney General's progress in the matter.

Members of the office of the Attorney General initiated communications with Mrs. Viles, examined the documents provided by her and spoke once by telephone with the executrix to confirm her understanding of what she had said. When an investigator from that office sought information from the Committee, Mr. Miller refused to supply any on grounds of Rule 37(18). No evidence or information came to the Attorney General's office except what was provided by Mrs. Viles and her client as a result of Mr. Raulerson's letter. The evidence presented to the Grand Jury consisted solely of evidence supplied by the office of the Attorney General.

2A. Questions raised by the Motion to Suppress.

1. Did the letter from Mr. Raulerson to the Attorney General dated October 31, 1978 contain a disclosure of information about a record or proceeding forbidden by Supreme Court Rule 37(18)?

2. If the answer to question 1 is yes, is the evidence obtained by the State as a result of that disclosure subject to a motion to suppress and does the defendant have standing to make such a motion?

3. If no answer to question 2 is yes.

2B. Questions raised by the Motion to Quash.

4. Is the indictment charging theft by obtaining unauthorized control with a purpose to deprive defective for omitting a reference to one of the alternative definitions of "purpose to deprive" contained in RSA 637:2,III?

5. If the answer to question 4 is yes, may the defect be cured by the State's electing to rely on a given definition from among the statutory alternatives, as it has done in this case?

3. Reasons for the transfers.

A. Questions 2A. 1. and 2.

There is a genuine issue raised by defendant's claim that the Chairman of the Committee on Professional Conduct, in applying the Committee's policy, has violated the confidentiality requirement of the Supreme Court's own rule. The issue is even more difficult if one assumes that DR 1-103(A) on its face obligated the Chairman to report any *unprivileged* information of the sort he had learned to the State prosecutorial authorities. If one makes the assumption that a

violation occurred the issue of standing is raised by the fact that the evidence obtained by the State, as distinguished from the allegations communicated to it, consisted of a file which the defendant was obligated to surrender by prior order of the Court, of bank and court records and of statements by the fiduciary. On the same assumption the problem of the appropriate remedy, claimed to be suppression, becomes difficult in view of the apparent obligation of Mrs. Viles to report the information in question to prosecutorial authorities under DR 1-103(A). These issues should be resolved in advance of trial as the defendant has requested, because public confidence in the judicial system's ability to deal effectively with a charge of a lawyer's misconduct requires that there be an orderly process for doing so, free from the uncertainty which the defendant's motion raises.

B. Questions 2B. 4. and 5.

These questions are prompted by the argument that no element has been omitted from the language of the indictment and no further facts would be required to be specified to constitute a valid indictment sufficient to allow proof under RSA 637:2,III(a), which the State has specified to be the definition it will rely upon. Because the trial will without doubt be highly publicized and have great effect on both the defendant's reputation and the integrity of the process which brings him to trial, it would be fairest to resolve the question prior to trial, especially in view of the need for guidance in advance of trial on the issue arising under Rule 37(18).

4. Appendix.

There shall be attached as an appendix to this transfer copies of the following pleadings:

1. Motion to Quash
2. Objection to Defendant's Motion to Quash
3. Motion to Suppress
4. Motion to Suppress (with Exhibits)
5. Addition to Motion to Suppress
6. Second Addition to Motion to Suppress

Dated: August 1, 1980

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Presiding Justice

Appendix C.

Excerpt of Testimony of
Robert Raulerson, Esquire

Mr. Dunn: All right. Let's get back to a situation where the Committee — there's been a resignation. The Committee has the power if it chooses and a further crime is suspected — assume those two things — the Committee has the power if it chooses to hold hearings and to petition for disbarment.

Mr. Raulerson: Well, the Committee's procedure under my chairmanship, which has been in excess of five years, is not to proceed but to report to the law enforcement authorities and to await the consummation of the criminal — criminal proceedings.

Mr. Dunn: And if there's a conviction —

Mr. Raulerson: And if there is a conviction, then the Committee then would proceed in an appropriate manner with a petition filed with the supreme court. The reason that the Committee acts in this manner is a practical and budgetary one. The Committee is not set up to do a full-scale investigative work. Attorney General's Office is and is adequately staffed for that purpose. So that, in those instances where the Committee has a feeling or an understanding or a suspicion that a crime has been committed, it reports that fact or urges the lawyer who has reported that information to them to report it to the Attorney General's Office.

Mr. Dunn: All right, Let's backtrack. I just want to make sure everything's clear. When you — in this particular case, when you suspected that perhaps a crime had been

committed pre-resignation, you or perhaps someone else had they been chairman of the Committee had a choice of, number one, going forward and holding your own hearing to look into the matter and seek disbarment if you found it was true or, number two, gather whatever facts were necessary so you wouldn't be making a libelous statement and inform the Attorney General to go forward.

Mr. Raulerson: Yes. That's true.

Mr. Dunn: And under your chairmanship, it just happens that you chose the second path as opposed to the first path.

Mr. Raulerson: Well, I wouldn't phrase it quite that way. I would say that that was the way the Committee opted for five years that I'm aware of.

Mr. Dunn: And it had certain benefits by way of budget.

Mr. Raulerson: Yes.

Mr. Dunn: Cheaper basically. Less expensive for the Committee.

Mr. Raulerson: More practical, yes.

(Trial Court Transcript 161-163).

Appendix D.

[FACSIMILE] EXHIBIT I

The State of New Hampshire Supreme Court

Professional Conduct Committee

[SEAL] 77 Market Street
Manchester, N.H. 03101

August 17, 1978

Bruce E. Viles, Esquire
21 Green Street
Concord, New Hampshire 03301

Dear Bruce:

As you are probably well aware the file which I delivered to your office on Monday, having to do with various matters in the Estate of Evelyn Wells, has continuing interest to this Committee. I am equally well aware that until you have sorted it out and digested at least some of the information contained in it there are unresolved problems and unanswered questions that must be worked out.

One of the obvious concerns is as to funds. Any indication of defalcation on the part of an attorney must be followed up at once and must be brought immediately to the attention of this Committee.

Among other sources of authority for such disclosure on your part is Canon 1 of the Code of Professional Responsibility and more specifically DR 1-103 (A) and (B).

I trust that you will be making the inventory of the file soon and I renew my offer to come up and assist you if you so desire.

Sincerely,

Wesley A.L. Miller
Administrator

WALM:mdg

[FACSIMILE] EXHIBIT II

stein & viles

Robert A. Stein attorneys at law Bruce E. Viles

October 20, 1978

Wesley A.L. Miller, Administrator
c/o New Hampshire Bar Association
77 Market Street
Manchester, New Hampshire 03101

RE: Estate of Evelyn R. Wells

Dear Mr. Miller:

I have tentatively completed my inventory of the above-mentioned estate for my client, the executrix, Jane W. Brabitz. Ms. Brabitz was previously represented by Leonard Merski. I apologize for the delay, but, yesterday, I finally received the complete information I requested on August 22, 1978 from the Indian Head Bank of Concord, New Hampshire. The Wells' estate accounts have been and are maintained with the Indian Head Bank.

In response to your letter of August 17, 1978 to report any indication of defalcation on the part of an attorney, I feel obliged to make the following information available to the Professional Conduct Committee of the Supreme Court of the State of New Hampshire.

(1) On January 18, 1978, the Indian Head Bank of Concord, New Hampshire received an authorization, purportedly

signed by the executrix of the above-mentioned estate, to make a cashier's check payable to Henry Dowst, Jr., Clerk of the Merrimack County Superior Court in the amount of $5,989.50. (See attached documents). The authorization ordered the Indian Head Bank to charge account number 01006408-7, which is the savings account maintained for the above-mentioned estate by the executrix.

Yesterday, I showed my client, the executrix, the copy of the above-mentioned authorization and she stated that the signature on the authorization was not her signature. She further stated that she never authorized such use of the estate funds to Mr. Merski.

Yesterday, I spoke with Henry Dowst, Jr., Clerk of the Merrimack County Superior Court to ascertain the purpose for which the above-mentioned cashier's check was paid to the Court. He supplied me with the attached documents, which are self-explanatory.

On August 10, 1978, a check made payable to the Estate of Evelyn Wells and signed by Leonard Merski was deposited in account number 1006408-7. This account is the savings account of the above-mentioned estate. (See attached documents).

(2) The above-mentioned estate owned eighteen (18) shares of common stock of U.S. Steel Corporation. Since these eighteen shares of stock were lost, they were not sold at the same time as were the other stocks of the estate. They were reissued by U.S. Steel Corporation (see enclosed document) and sold by Paine, Webber, Jackson and Curtis of Concord, New Hampshire. Mrs. Joy Eaton of Paine, Webber checked her company records and told me that these eighteen (18) shares

of U.S. Steel Corporation were sold on August 5, 1977 for $35.25 per share. After commissions, postage and S.E.C. tax were deducted, a check was made payable to Jane Brabitz, executrix, estate of Evelyn R. Wells, c/o Leonard Merski, 28 Green Street, Concord, New Hampshire in the amount of $614.26.

The amount of $614.26 was not deposited in either the estate's checking or savings account (see attached documents).

Yesterday, I spoke with Ms. Brabitz and to the best of her knowledge and remembrance, she did not directly receive the amount of $614.26.

If you have any questions, do not hesitate to call me.

Sincerely,

Bruce E. Viles

BEV/mad

CC: Jane W. Brabitz

[FACSIMILE] EXHIBIT III

The State of New Hampshire Supreme Court

[SEAL] Professional Conduct Committee

October 31, 1978

Thomas Rath
Attorney General
State of New Hampshire
State House Annex
Concord, NH 03301

RE: Leonard Merski, Esq., Concord, NH

Dear Mr. Rath:

As you are aware, in July and August this Committee was involved in an investigation of the above captioned attorney. As a result of that investigation, Mr. Merski petitioned the Court for resignation with prejudice. The Court granted this request and instructed this Committee to supervise the closing out of Mr. Merski's practice and the transfer of his files to the clients. In connection with carrying out the Court's assignment, it has come to our attention that Mr. Merski may have committed forgery and embezzlement with respect to his handling of the Estate of Evelyn Wells. The Executor of this estate is Jane W. Brabitz and is currently represented by Bruce E. Viles, Esquire, of Concord, New Hampshire. Ms.

Viles can supply you with detailed information concerning the conduct which appears to be violative of the criminal statutes of New Hampshire.

Should you have any questions, please feel free to contact me.

Very truly yours,

Robert A. Raulerson
Chairman

RAR/df

EXHIBIT IV

November 2, 1978

Robert A. Raulerson, Chairman
Professional Conduct Committee
N.H. Supreme Court
Concord, New Hampshire 03301

Dear Mr. Raulerson:

Thank you for your letter of October 31 referring to us information concerning the possible criminal conduct of Leonard Merski. I am referring this matter to our White Collar Crime Unit and I am certain that you will be hearing from them as to their progress in the matter.

I give you my assurance that we will attempt to move this matter along with as much expedition as possible, allowing, of course, for a thorough exploration of the same.

Very truly yours,

Thomas D. Rath
Attorney General

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[FACSIMILE] EXHIBIT III

The State of New Hampshire Supreme Court

[SEAL] Professional Conduct Committee

November 6, 1978

Thomas Rath
Attorney General
State of New Hampshire
Room 208, State House Annex
Concord, NH 03301

Dear Mr. Rath:

Thank you for acknowledging my letter of October 31. I am pleased to hear that the matter will be investigated and processed with some expedition. I would appreciate hearing from your office at an appropriate time as to your progress in the matter. Thank you for your cooperation.

Sincerely yours,

Robert A. Raulerson
Chairman

RAR/df